

DOCUMENT RESUME

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[Overtime Compensation for Standby Duty]. B-188025. July 21, 1977. 5 pp.

Decision re: Roy C. Bauer; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (005).

Organization Concerned: Defense Supply Agency.

Authority: Fair Labor Standards Act, as amended (29 U.S.C. 201 et seq.). 5 U.S.C. 5545(c) (1). 5 U.S.C. 5542. 5 C.F.R. 550.143(b). B-182207 (1975). B-173899 (1971). B-141846 (1970). Armour and Co. v. Wantock, 323 U.S. 126, 133 (1944). Rapp and Hawkins v. United States, 167 Ct. Cl. 852 (1964). Moss v. United States, 173 Ct. Cl. 1169 (1975).

Lt. Col. D. L. Applegarth, Acting Chief, Accounting and Finance Division, Defense Supply Agency, requested an advance decision in connection with a claim for overtime or premium compensation for hours spent in a standby status as a requirement of his job. The employee who was required to be available by phone was not entitled to premium pay since his residence had not been classified as his duty station, and his activities were not so severely limited as to make his standby duty hours compensable under 5 U.S.C. 5545(c) (1). (Author/SC)

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DECISION



JANNICE
C. B.
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-188025

DATE: July 21, 1977

MATTER OF: Roy C. Bauer - Overtime compensation for standby duty

DIGEST: Employee who is required to be available by telephone, either at his residence or within 30 minutes of port, in order to perform fuel sampling and inspection of barges upon arrival at port, is not entitled to premium pay since his residence has not been designated as his duty station and because his whereabouts and activities were not so severely limited as to make his standby duty hours compensable under 5 U.S.C. § 5545(c)(1). Neither would standby time at employee's residence be considered "hours of work" under 5 U.S.C. § 5542.

This decision is issued in response to a request for an advance decision submitted by Lieutenant Colonel D. L. Applegarth, Acting Chief, Accounting and Finance Division, Office of the Comptroller, Defense Supply Agency, Alexandria, Virginia, in connection with the claim of Mr. Roy C. Bauer for overtime or premium compensation for hours he spent in a standby status as a requirement of his job as Quality Assurance Specialist with the Defense Supply Agency.

The record shows that as a Quality Assurance Specialist Mr. Bauer is required to perform standby duty on a regular basis while awaiting the arrival of barges. The Quality Assurance Specialist must, among other things, perform fuel sampling and inspection of barges within 1 hour of barge arrival. Contractual requirements provide for notification of barge arrival to be accurate only to within 24 hours of actual arrival time. If the Quality Assurance Specialist is unavailable, demurrage charges of \$100 or more per hour may be charged to the Government. In order to avoid delay and the demurrage charges which would result, Quality Assurance Specialists are regularly required to remain on standby duty at their homes on an average of 1 1/2 hours per week. There is no requirement that the Quality Assurance Specialist remain at home but due to the time constraints involved, immediate telephone contact is necessary and the normal practice is to remain at home. However, the Quality Assurance Specialist can furnish a

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telephone number at which he can be reached if he desires to leave his home. Prior to September 1976, Quality Assurance Specialists on standby duty had to remain within 30 minutes of the port so as to respond to notification of barge arrival and to be able to perform fuel sampling and barge inspection before off loading of barges. In September 1976, the Defense Fuel Supply Center provided a clarification of the standby duties of Quality Assurance Specialists and the response time was increased to 3 hours.

Mr. Bauer has made a claim against the Defense Supply Agency in the amount of \$5,764.58 for compensation for standby services performed over a 25.5 year period. Due to doubt surrounding the propriety of payment of Mr. Bauer's claim, the Finance and Accounting Officer has submitted the claim to our Office for an advance decision as to whether Mr. Bauer is entitled to overtime or premium compensation for any part of the period claimed.

The job description for the position of Quality Assurance Specialist shows that such positions are exempt from the provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. § 201, et seq. (Supp. IV, 1974). Therefore, there are only two provisions of law under which overtime compensation for Mr. Bauer's standby duty could have been authorized if the conditions of law and regulations were met. The first provision is found in 5 U.S.C. § 5542 (Supp. I, 1971) which provides in pertinent part as follows:

"(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates * * *."

In order to qualify for overtime compensation under this provision of law it is necessary that Mr. Bauer establish that the standby time at home constituted "hours of work" within the meaning of those words as used in the statute.

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In Armour and Co. v. Wantock, 323 U.S. 126, 133 (1944), the Supreme Court, in order to determine what constituted "work," used the criterion of whether the time in question was spent "*** predominantly for the employer's benefit or for the employee's ***" and stated that this was "*** dependent upon all the circumstances of the case."

In the case of Kapp and Hawkins v. United States, 167 Ct. Cl. 852 (1964), involving claims for overtime compensation under circumstances substantially similar to those here involved, it was held that although the claimants were required to be within hearing distance at all times to answer the telephone and to take appropriate action in the situations presented to them by telephone, they were not to be regarded as performing work within the meaning of the overtime statute and thus were not entitled to compensation for such services. The court in that case noted that "theoretically the duty officer could be disturbed at any hour during the night." To the same effect is Moss v. United States, 173 Ct. Cl. 1169 (1965).

Ordinarily an employee who is in a standby status at home to answer the telephone is free to read, eat, sleep, entertain friends and otherwise follow his normal pursuits while standing the telephone watch. See Matter of Glen W. Sellers, B-18220, January 16, 1975.

It appears that the holdings of the above cases, to the effect that the employees were not entitled to compensation for standby duty when no duties were performed, would preclude payment of overtime to Mr. Bauer. This is especially so since by merely leaving a telephone number at which he could be reached he was free to leave his home and to travel within a range of 30 minutes from the port. The facts presented are not sufficient to make the standby time Mr. Bauer spent at his residence awaiting arrival of barges compensable hours of work under 5 U.S.C. § 5542. See Matter of Glen W. Sellers, supra; B-173899, September 27, 1971; B-141846, June 30, 1970.

The second provision of law for consideration is 5 U.S.C. § 5545 (1970) which deals with premium pay for standby duty and which provides in pertinent part as follows:

"(c) The head of an agency, with the approval of the Civil Service Commission, may provide that—

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"(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. * * *"
(Emphasis added.)

While the above provision does not mention standby duty at an employee's home, the Civil Service Commission has issued regulations to the effect that under certain circumstances an employee's home may be designated as his official station by the department concerned.

In defining the phrase "at, or within the confines of, his station" used in 5 U.S.C. § 5545(c)(1), subsection 550.143(b) of title 5 of the Code of Federal Regulations (1977) provides:

"(b) The words 'at, or within the confines of, his station,' in § 550.141 mean one of the following:

"(1) At an employee's regular duty station.

"(2) In quarters provided by an agency, which are not the employee's ordinary living quarters, and which are specifically provided for use of personnel required to stand by in readiness to perform actual work when the need arises or when called.

"(3) In an employee's living quarters, when designated by the agency as his duty station and when his whereabouts is narrowly limited and his activities are substantially restricted. This condition exists only during periods when an employee is required to remain at his quarters and is required to hold himself in a state of readiness to answer calls for his services. This limitation on an employee's whereabouts and

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activities is distinguished from the limitation placed on an employee who is subject to call outside his tour of duty but may leave his quarters provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required." (Emphasis supplied.)

Clearly, subsections (b)(1) and (b)(2) are not applicable in the present case. As for subsection (b)(3), Mr. Bauer's home has never been designated as his duty station. Moreover, as our previous discussion of Supreme Court and Court of Claims cases reveals, neither Mr. Bauer's whereabouts nor his activities were so severely limited as to make his standby duty hours compensable under 5 U.S.C. § 5545(c)(1) or any other statutory provision nor does it satisfy subsection 550.143(b)(3) of title 5 of the Code of Federal Regulations. See Matter of Claude M. Schonberger, B-173783.116; April 1, 1975, and Sellers, supra.

For the above-stated reasons, the voucher submitted on behalf of Mr. Roy C. Bauer claiming \$5,764.58 for compensation for time spent on standby duty may not be certified for payment.


Deputy Comptroller General
of the United States